85-484 (1)

No.

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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IN THE

Supreme Court of the United States

October Term, 1985

JACK MILLER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

ROBERT S. AMDURSKY
Counsel of Record
153 East 53rd Street
New York, NY 10022
(212) 935-8000

LEONARD H. AMDURSKY
Attorney for Petitioner
26 East Oneida Street
Oswego, NY 13126
(315) 343-6363

September 23, 1985

Question Presented.

Whether a corporate officer may be held civilly liable for a corporate violation of the Rivers and Harbors Act of 1899 (33 U.S.C. §411) absent sufficient allegations and proof to permit negation of the corporate firm.[1]

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[1]The case at the District Court was originally titled *United States v. Pollution Abatement Services of Oswego, Inc.* (PAS). The complaint was amended to name H. Willard Pierce and Jack Miller as co-defendants. PAS, although existing at the time of the hearing for a preliminary injunction in August, 1977, did not appear. Subsequently, PAS was dissolved by proclamation for non-payment of taxes. Pierce and Miller appealed to the Second Circuit. Miller is the sole petitioner here, however, Pierce remains an interested party.

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985.

JACK MILLER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR A WRIT OF CERTIORARI.

The petitioner, Jack Miller, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered on this proceeding on June 3, 1985.

Opinion Below.

The judgment of the Court of Appeals, reported at 763 F. 2d 133, appears in the appendix hereto. The District Court for the Northern District of New York rendered a decision from the bench which was transcribed and is attached hereto in the appendix.

Jurisdiction.

The judgment of the Court of Appeals for the Second Circuit was entered on June 3rd, 1985. An order extending the time for which to file a petition for a writ of certiorari to and including September 23rd, 1985, was signed on September 9th, 1985, by Justice Marshall. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Statutory Provisions Invoked.

United States Code, Title 33, Section 407:

> It shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited either from or out of any ship, barge, or other floating craft of any kind, or from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water; and it shall not be lawful to deposit, or cause, suffer, or procure to be deposited material of any kind in any

place on the bank of any navigable water, or on the bank of any tributary of any navigable water, where the same shall be liable to be washed into such navigable water, either by ordinary or high tides, or by storms or floods, or otherwise, whereby navigation shall or may be impeded or obstructed: Provided, That nothing herein contained shall extend to, apply to, or prohibit the operations in connection with the improvement of navigable waters or construction of public works, considered necessary and proper by the United States officers supervising such improvement or public work: And provided further, That the Secretary of the Army, whenever in the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby, may permit the deposit of any material above mentioned in navigable waters, within limits to be defined and under conditions to be prescribed by him, provided application is made to him prior to depositing such material; and whenever any permit is so granted the conditions thereof shall be strictly complied with, and any violation thereof shall be unlawful.

United States Code, Title 33, Section 411:

Every person and every corporation that shall violate, or that shall knowingly aid, abet, authorize, or instigate a violation of the provisions of sections 407, 408, and 409 of this title shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding $2,500 or less than $500, or by imprisonment (in the case of a natural person) for not less than thirty days nor more than one year, or by both such fine and im-

prisonment, in the discretion of the court, one-half of said fine to be paid to the person or persons giving information which shall lead to conviction.

Statement of the Case.

On July 19th, 1977, the United States filed an action against Pollution Abatement Services of Oswego, Inc. (hereinafter PAS) alleging continuing violations of Section 13 of the Rivers and Harbors Act of 1899. 33 U.S.C. 401 *et seq.* Section 13 of the Act, 33 U.S.C. §407, is popularly referred to as the "Refuse Act."

PAS incorporated in 1970 and operated a liquid and solid waste disposal service for industrial users. The PAS site, located in Oswego, New York, was contiguous to Wine Creek, a tributary of Lake Ontario. The complaint alleged that PAS had been discharging or depositing refuse matter in the nature of oils and chemicals on the banks of Wine Creek and that these materials had leaked or discharged into Wine Creek.

On August 15th, 1977, the United States amended their complaint and named as co-defendants H. Willard Pierce and Jack Miller, President and Vice President, respectively, of PAS. On August 16th, 1977, the United States moved for a preliminary injunction. A hearing was held on the injunction and the District Court orally presented its Findings of Fact and Conclusions of Law on August 26th, 1977. The Court found that PAS was a small, closed corporation having four stockholders whose interests were divided into three thirty percent (30%) interests with one ten percent (10%) interest going to the corporate attorney. The Court found that

> (T)he individual defendants, by reason of their respective positions and activities in the corporation, and by reason of their activities, had the responsibility and the authority either to prevent, in the first instance, or promptly to correct the violations complained of and they failed to do so.

Because the evidence at the District Court showed that PAS and the individual defendants had limited financial resources the Court ordered the United States to perform such operations as are necessary to accomplish the immediate clean up of the PAS site. The Court ordered that judgment be entered against the defendants, jointly and severally, for the cost of such operation, the dollar amount to be left blank until the cost of the clean up had been certified. The amount of the clean up was later certified as $411,269.10. The District Court found the amount to be reasonable and Pierce and Miller appealed to the Court of Appeals for the Second Circuit on the question of corporate officer liability. The Court of Appeals affirmed the District Court judgment.

Reasons for Granting Writ.

The decision below conflicts with the decisions of another Court of Appeals as to corporate officer liability under The Rivers and Harbors Act of 1899.

On February 17, 1976, the United States Court of Appeals, Fifth Circuit decided both *United States v. Sexton Cove Estates, Inc.*, 526 F.2d 1293, 1300-01 (5th Cir. 1976), and *United States v. Joseph G. Moretti, Inc.*, 526 F.2d 1306, 1310 (5th Cir. 1976). In both cases, the Court construed sections of The Rivers and Harbors Act (the Act) which the Second Circuit found to be analogous to 33

U.S.C. 407 and 411 (Sections 13 and 16 of the Refuse Act). In each case an officer of the named corporate defendant was named as a co-defendant. In *Sexton Cove*, the Court held that "(a) corporate officer may not be held civilly liable for a corporate violation . . . [unless] there are sufficient allegations and proof to permit negation of the corporate form." 526 F.2d at 1300. Citing *Sexton Cove*, the Court held the same in *Moretti* (526 F.2d at 1310).

The Second Circuit below distinguished the *Sexton Cove* and *Moretti* decisions by stating "Clearly the Fifth Circuit viewed the officer's liability in that case as derivative rather than personal. By contrast, the liability imposed upon Pierce and Miller was not permised solely on their corporate offices or ownership, but was bottomed on their personal involvement in [PAS's] activities."

The Second Circuit infers that in *Sexton Cove* and *Moretti* the corporate officers did not have a personal involvement in their respective firm's activities and thus were not considered individually liable for the violations of the Act. The inference is incorrect. If anything is clear, it is that the District Court and the Fifth Circuit considered the corporate officers in each case personally involved and in violation of the Act. Derivative liability was never mentioned by any court passing on these cases.

In *United States v. Sexton Cove Estates, Inc.*, 389 F. Supp. 602 (S.D. Fla. 1975), the District Court found that Ralph Osterle, the co-defendant, was the President and resident agent for the corporation. The firm was involved in developing a residential area and plugged, excavated and cleared canals which affected navigable waters in violation of the Act. Osterle was personally involved in contracting and arranging for all of the work to be done

(389 F. Supp. at 604, 605). The Court made no distinction between the co-defendant's liability when it directed the defendants, corporate and individual, to fill all canals they had dug and enjoined them from further violations (389 F. Supp. at 613).

The personal involvement of the corporate officer in *Moretti* is even more evident. Joseph G. Moretti, Jr. was named as a co-defendant in *United States v. Joseph G. Moretti, Inc.* 331 F. Supp. 151 (S.D. Fla. 1971). Like *Sexton Cove*, the violation here was for excavating and plugging canals which affected navigable waters nearby. The Court found that Moretti, Jr. was the Vice President of the corporation and that he was responsible for the operation of the development. (331 F. Supp. at 153) The Court, making no distinctions, stated ". . . [T]he *defendants* ignored and violated statutes of the United States . . ." (331 F. Supp. at 157, emphasis ours).

On appeal, the Fifth Circuit noted that Moretti, Jr. was arrested for a violation of the Act in 1971. 478 F.2d 418, at 427 (5th Cir. 1973). The Court also found that Moretti, individually, violated the Act (478 F.2d at 421). The Court vacated in part the order of the District Court and remanded the case for further proceedings.

On remand, 387 F. Supp. 1404 (S.D. Fla. 1975), the District Court stated ". . . That Moretti violated the Act flagrantly . . ." (387 F. Supp. at 1405). Also, the Court permanently restrained Moretti, Jr. and the corporation from further violations of the Act (387 F. Supp. at 1407).

It is incontrovertible that the corporate officers in *Sexton Cove* and *Moretti* were personally involved in their respective firm's activities. They were not named co-defendants solely on the basis of their corporate offices or

ownership. The parallels between the facts at bar and the facts before the Fifth Circuit make inconceivable the Second Circuit's statement that ". . . reliance on the cases from the Fifth Circuit is misdirected and wholly unavailing."

The fact that the Second Circuit had to support its decision by citing a recent case involving the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. §§9601-57 (1982) (CERCLA)—which it terms analogous to the Act—further speaks to the misdirection of its opinion. CERCLA specifically addresses corporate officer liability and is in no way analogous to the Act other than that it deals with environmental issues. CERCLA is a modern day response to a modern day problem. The Rivers and Harbors Act of 1899 is an archaic criminal statute which has been stretched and convoluted to allow limited civil remedies. The Second Circuit admits that "[t]his Court has not previously held corporate officers personally liable for violation of the . . . Act." To allow this expansive decision to stand bare, unsupported by any precedent, and directly at odds with the decisions of the Fifth Circuit is an injustice to the petitioner and corporate officers in general.

Petitioner can see no distinction between the facts in *Moretti, Sexton Cove* and the instant case to warrant separate treatment by the Second Circuit. In the absence of allegations of proof of fraud or ulterior motives in the formation of a corporation, the corporate veil should not be pierced, and the individuals within the corporation, acting in good faith, cannot be subject to individual liability. There has never been any allegation or evidence that petitioner acted in such a way so to allow negation of the corporate form.

CONCLUSION.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

ROBERT S. AMDURSKY
Counsel of Record
153 East 53rd Street
New York, NY 10022
(212) 935-8000

LEONARD H. AMDURSKY
Attorney for Petitioner
26 East Oneida Street
Oswego, NY 13126
(315) 343-6363

September 23, 1985

Second Circuit Decision.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1281 — August Term, 1984

(Argued: May 29, 1985 Decided: June 3, 1985)

Docket No. 85-6005

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—against—

POLLUTION ABATEMENT SERVICES OF OSWEGO, INC., H. WILLARD PIERCE and JACK MILLER,
Defendants-Appellants.

Before:

KAUFMAN and KEARSE, *Circuit Judges*, and MISHLER*, *District Judge.*

Pierce and Miller, former owners and officers of Pollution Abatement Services of Oswego, Inc., appeal from a judgment of the United States District Court for the Northern District of New York (Edmund Port, *Judge*) imposing civil liability for violations of Section 13 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. § 407 (1982).

Affirmed.

* The Honorable Jacob Mishler, District Judge, Eastern District of New York, sitting by designation.

LEONARD H. AMDURSKY, Oswego, New York, *for Defendants-Appellants Pierce and Miller.*

MARIA A. IIZUKA, Washington, D.C., (F. Henry Habicht II, Assistant Attorney General, Frederick J. Scullin, Jr., U.S. Attorney, Syracuse, New York, Craig A. Benedict, Assistant U.S. Attorney, Syracuse, New York, Robert L. Klarquist, Elizabeth Yu, Department of Justice, Washington, D.C., Eric Schaff, Environmental Protection Agency, New York, New York, Elizabeth Cox, Ephriam King, Environmental Protection Agency, Washington, D.C., *on the brief*), *for Plaintiff-Appellee.*

KAUFMAN, *Circuit Judge:*

BACKGROUND

Pollution Abatement Services of Oswego, Inc. ("PAS") operated an industrial waste disposal service in Oswego, New York. The PAS site was located on the banks of Wine Creek, which flows into Lake Ontario. H. Willard Pierce, the President of the firm, and Jack Miller, its Vice-President, ran the company's day-to-day operations and were two of only four shareholders.

In 1977, the United States brought an action against PAS, Pierce and Miller, charging violations of Section 13 of the Rivers and Harbors Appropriations Act of 1899 (the "Act"), 33 U.S.C. § 407 (1982). Specifically, the complaint alleged that PAS had been discharging refuse

into Wine Creek since early 1976. Moreover, the government claimed the firm had been storing thousands of drums of highly toxic chemicals—including polychlorinated biphenols (PCBs), pesticides, and hydrocarbons—on the banks of the creek.

At a hearing on the government's motion for a preliminary injunction, the district court addressed the liability of both the corporate and individual defendants. In assessing the roles of Pierce and Miller in the operation of the enterprise, Judge Port stated that

> [t]he individual defendants, by reason of their respective positions and activities in the Corporation, and by reason of their activities, had the responsibility and the authority either to prevent, in the first instance, or promptly to correct the violations complained of, and they failed to do so.

The court also noted that PAS was a small, closely held corporation, and inferred that there were "overlapping responsibilities of the officers and managers who were running the Company." In sum, Judge Port held that it was "quite uncontrovertible" that individual defendants were personally accountable for the violations.

In fashioning a remedy, the court recognized that PAS had neither the financial resources nor technical expertise necessary to effect a proper clean-up of the site. Accordingly, Judge Port directed the government to undertake a clean-up operation in an expeditious manner. At the same time, he ordered that a judgment be entered against the corporation and its individual officers, jointly and severally, for the cost of such operations, with the dollar amount left blank until the magnitude of the expenditures could be ascertained.

Removal of the toxic materials stored at the PAS site required approximately two years. In March 1983, the government certified the amount of $411,269.10 as the reasonable and necessary costs of complying with the court's order, and that sum was entered in the judgment that had previously been left blank.[1] Pierce and Miller timely filed a notice of appeal.[2]

DISCUSSION

At the outset, we note that, although § 16 of the Act, 33 U.S.C. § 411, which enforces § 13, expressly provides only for fines and prison sentences, Pierce and Miller concede "it is well settled that the Court has the authority to issue injunctions, . . . as well as order the government to enforce The Act and then recover its costs in a civil action." (Brief for Appellants at 7-8). *See Wyandotte Transp. Co.* v. *United States*, 389 U.S. 191, 204 (1967); *United States* v. *Perma Paving Co.*, 332 F.2d 754, 757-58 (2d Cir. 1964). Moreover, they do not take issue with the dollar amount claimed by the government. The sole issue on appeal, therefore, is whether personal liability may be imposed upon the individual defendants.

---

[1] Pierce and Miller appealed to this Court from the final judgment entered in 1983. After a pre-argument conference held pursuant to our Civil Appeals Management Program, the case was remanded to the district court to determine whether it had the authority to enjoin the defendants from further discharging, to require the government to clean up the site, and to authorize the government to certify the costs of the clean-up, and to consider whether the sum expended for the clean-up costs was reasonable. By order date October 8, 1984, the district court found that it was authorized to issue those orders, and stated that the defendants had stipulated that the sum expended was reasonable and necessary. Final judgment was entered on October 18, 1984, and this appeal followed.

[2] PAS, which was dissolved by proclamation for nonpayment of taxes, is not a party to the instant appeal.

Pierce and Miller mistakenly frame the issue as whether corporate officers may be held civilly liable for a corporate violation of the Act. Accordingly, they rely almost exclusively on *United States* v. *Sexton Cove Estates, Inc.*, 526 F.2d 1293, 1300-01 (5th Cir. 1976) (construing sections of the Act analogous to §§ 13, 16), and its companion case, *United States* v. *Joseph G. Moretti, Inc.*, 526 F.2d 1306, 1310 (5th Cir. 1976) (relying on and following *Sexton Cove*). In *Sexton Cove*, the court held that "[a] corporate officer may not be held civilly liable for a *corporate violation* . . . [unless] there are sufficient allegations and proof to permit negation of the corporate form." 526 F.2d at 1300 (emphasis added). Clearly, the Fifth Circuit viewed the officer's liability in that case as derivative rather than personal. By contrast, the liability imposed upon Pierce and Miller was not premised solely on their corporate offices or ownership, but was bottomed on their personal involvement in the firm's activities. Accordingly, appellants' reliance on the cases from the Fifth Circuit is misdirected and wholly unavailing.

This Court has not previously held individual corporate officers personally liable for violations of the Rivers and Harbors Act. In examining the statutory language and our precedents, however, we are drawn to the inescapable conclusion that the activities of Pierce and Miller fall within the proscriptive ambit of the Act. Section 16, 33 U.S.C. § 411 (1982), provides that "[e]very person and every corporation that shall violate, or that shall knowingly aid, abet, authorize, or instigate a violation" of the relevant section of the Act may be held criminally liable. Pierce and Miller argue that Section 16, which refers explicitly only to criminal sanctions, is wholly irrelevant. We disagree. Courts have long al-

lowed for the imposition of civil liability upon corporations for violations of the Act. *See Wyandotte, supra*, 389 U.S. 191; *Perma Paving, supra*, 332 F.2d 754; *see also In re Oswego Barge Corp.*, 664 F.2d 327, 335 (2d Cir. 1981) (discussing judicially created civil remedies under the Act). In light of the clear congressional intent to hold "person[s]" liable for violations, we see no reason to shield from civil liability those corporate officers who are personally involved in or directly responsible for statutorily proscribed activity.

Our holding today comports with this Court's expansive construction of remedial environmental statutes. In *United States* v. *American Cyanamid Corp.*, 480 F.2d 1132, 1135 (2d Cir. 1973), we eschewed a "cramped reading" of the Rivers and Harbors Act, focusing on its broad remedial purposes. More recently, in construing the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. §§ 9601-57 (1982)—an analogous statute—we held a corporate officer individually liable without piercing the corporate veil. *See New York* v. *Shore Realty Corp.*, No. 7925, slip op. 3065, 3100-01 (2d Cir. Apr. 5, 1985).

Ample evidence was adduced before the district court to support a finding that Pierce and Miller were responsible for PAS's day-to-day operations, and for its illegal dumping and storage activities. As a result, we believe the imposition of civil liability upon them was proper.

Accordingly, the judgment of the district court is affirmed.

District Court Decision.

Decision of Judge Port Dated August 26, 1977.

STATE OF NEW YORK, SUPREME COURT,

COUNTY OF ONONDAGA.

UNITED STATES OF AMERICA

vs.

POLLUTION ABATEMENT SERVICES OF OSWEGO, INC., *et al.*

File No. 77-CV-271

Appearances:

Leonard Amdursky, Esq., for Jack Miller.
H. Willard Pierce, Esq., *pro se.*
No appearances on behalf of Corporation.

Decision of the Honorable Edmund Port, Judge of the United States Court, Northern District, held on August 26, 1977 in the offices of the Auburn Post Office Federal Building, Auburn, New York.

Decision.

The Court: Let the record show that Counsel are present, together with the individual defendants, Pierce and Miller.

Gentlemen, since the adjournment of last night, I have had an opportunity to examine the exhibits, review my notes of the testimony, review the notes taken by my clerk, and examine the memorandum of laws admitted by the Plaintiff.

I will now put a relatively brief statement on the record which will serve as my findings of fact and conclusions of law.

The action is brought by the United States of America against Pollution Abatement Services of Oswego, Inc., H. Willard Pierce and Jack Miller. The Pollution Abatement Services will probably be variously referred to in my remarks as P A S, the Corporate Defendant, the Company, and perhaps by some other designation that doesn't immediately come to mind. The defendants, Pierce and Miller, will probably be referred to as the individual defendants, jointly.

The action is brought to obtain an injunction or injunctive relief against the defendants from violating Section 13 of the Rivers and Harbors Act of 1899, 33 U. S. Code, Section 407.

That section provides, in pertinent part, as follows: "It shall not be lawful to throw, discharge or deposit, or cause, suffer or procure to be thrown, discharged or deposited, either from the shore, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever, into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water. And it shall not be lawful to deposit, cause, suffer or procure to be deposited material of any kind in any place on the bank of any navigable water, or on the bank of any tributary of any navigable water where the same shall be liable to be washed into such navigable water, either by storms or floods or otherwise."

Lake Ontario is a navigable water as is Wine Creek. The Corporate Defendant was a New York Corporation at all

times and was in the business—it was incorporated for the purpose of providing a liquid and solid waste disposal service to industrial users.

In connection with its operation, it accepts and receives for disposition various liquids and solid wastes in bulk deliveries and in 55-gallon drums.

Its method of disposal was by incineration of incinerable wastes and by using landfill, not on these premises, but on other premises, for other wastes.

The P A S facility was located on East Seneca Street on the outskirts of Oswego, New York adjacent to, or continuous to the property used by the Corporate Defendant, and partially bounded by it was Wine Creek and the east branch of Wine Creek which has been variously referred to as No-Name Creek and the east branch of Wine Creek, and Wine Creek.

By reason of the operation of the P A S facility, including the storage of materials on its premises, and by permitting spills of refuse matter consisting of oils, chemicals, and other pollutants.

Such pollutants or refuse have been discharged into Wine Creek and its east branch.

This has occurredd on a number of occasions since April of 1976 up until the present time. Unless action is taken to prevent it, it is likely to continue and recur in the future.

During all the pertinent times involved in this case, the defendants, H. Willard Pierce and Jack Miller, were stock holders, directors and officers of the Corporate Defendant.

In the operation of the facility, P A S has deposited and is depositing or is accumulating refuse material on the banks of Wine Creek which is likely to be washed into Wine Creek, and ultimately, into Lake Ontario by storms, floods, rains and other natural phenomenon.

The individual defendants, by reason of their respective positions and activities in the Corporation, and by reason

of their activities, had the responsibility and the authority either to prevent, in the first instance, or promptly to correct the violations complained of, and they failed to do so.

The Plaintiff has demonstrated a likelihood of success on the merits, the failure to perform preliminary relief with the resultant further violation of the Act, referring, of course, to the Rivers and Harbors Act of 1899, and would cause irreparable injury to the Plaintiff, the United States, its citizens, and navigable waters.

The Court concludes that it has jurisdiction over the subject matter and the parties, and that the Plaintiff is entitled to a preliminary injunction. *New York v. Nuclear Regularity Commission,* 550 F 2d 745, (2d cir. 1977.)

I think that the defendants, and particularly Mr. Pierce, having appeared here *pro se,* is entitled to probably a more detailed explanation of how his—or how the defendants' liability arises.

Section 13 of the Rivers and Harbors Act, that is Section 407 that I referred to earlier, is the statute which attaches criminal liability to prohibited conduct, even though no criminal intent is established. It is what is known as a Malum Prohibitum statute. The doing of the act in and of itself, or the omission or failure to do a required act, in and of itself creates the violation.

The *United States v. American Cyanamide Co.,* 354 F sup 1202, affirmed 480 F 2d 1132, (2d cir. 1973.)

This Act had been held by the Courts to warrant under appropriate circumstances such as have been demonstrated here, the granting of injunctive relief, although the statute contains specifically only criminal sanctions.

The Courts have construed this Act to afford relief by way of injunction, among others, although the words injunction, are not used in the statute, *United States v. Republic Steel Corp.,* 382 US 482, 1960, and *United States against Consolidated Coal Co.,* 354 F sup 173, Northern District, W. V. 1973.

The materials flowing through Lake Ontario into Wine Creek are without question refuse within the meaning of the Act. Now, it isn't even necessary to show they are deleterious to health or anything else. They are foreign matters that don't belong in water going into a navigable stream. See *United States Standard Oil Co.*, 384 US 224, 1976. That was the case involving oils, plain oils.

While the defendants seem to have asserted that the defense to the action—that some good faith efforts to prevent the pollution to navigable waters was demonstrated, that does not, as a matter of law, constitute a defense.

The personal responsibility of the individual defendants arises out of the facts that demonstrate that they were in a position to control the activities of the Company in such a manner as to have in the first instance, not caused the pollutants to flow into the navigable water, and in the second instance, to have remedied the situation.

The testimony shows that the Defendant Corporation is a small, closed corporation having, I believe four stock holders whose interests were divided into three thirty per cent interests with ten per cent interest going to the attorney who, I would infer, incorporated the company and had something to do with its organization. By the very nature of the Corporation and its size, without the definite proof that we had, I think you would infer that there would be overlapping responsibilities of the officers and managers who were running the Company. It obviously was not so departmentalized as to either of the defendants, so that one of them could claim to be insulated from the prohibited conduct. *United States v. Park*, 421 U S 658, 1975.

In that case, this principle of which I speak, went so far as to hold the President of a large—one of the largest chains of food markets in the country, possibly in the world, responsible for the infestation of warehouses, and I believe it was Philadelphia and Baltimore, because he was responsible for the entire operation of this great chain.

The liability on the part of the defendants seems to be quite uncontrovertible.

Fixing the remedy has presented to me, as I listened to the case, a far more difficult problem. It was for that reason that at the recess yesterday, I required the parties to submit suggestions to the Court for means of—let's say, putting our finger in the dike, pending the trial of the action for final injunctive relief.

The immediate remedy involves expertise that I obviously don't possess. Consequently, I must rely on the parties for advice. That I have done.

On the other hand, I am obliged to formulate a pragmatic judgement that will accomplish the purposes for which the action was brought. That was to prevent further pollution of Lake Ontario.

It will be a relatively simple matter, now that I found that the Plaintiffs are entitled to relief to just direct the defendants, issue an edict directing the defendants to do certain things that would alleviate the situation. But I would have to be blind to reality to do that, because issuing edicts would not remove pollutants nor would not stop the flow of water downhill. By doing that would be about as effective as baying at the moon.

From listening to the evidence, it is clear to me that from the very start of this Company, it was plagued by a lack of resources, both technical and financial. This deficiency throughout the history of the Company, I think, was the primary cause of the problem that we are meeting today. I can realize that from the standpoint of the individuals who have undoubtedly invested considerable sums in this enterprise, that it is difficult for them to assume responsibility. It is difficult as a matter of human nature to assume responsibility.

Some case I read one time said that the two most difficult words to state are "Mea culpa." But objectively, subject to the—guided, rather by the established law, there

is no question in my mind that these individuals have a legal responsibility.

Now, as I have said on the record, I have recognized and directed them to do this, isn't going to clean it up. Nevertheless, whatever judgement I do issue, certainly needs to operate against them. They are the responsible individuals. It is no problem, insofar as restraining further content. The defendants, their agents, servants, employees, anyone acting in concert with them, can be restrained and it is requested in the show cause order, from any action which would further cause refuse to be introduced into Lake Ontario in any manner. But merely doing that is not the whole answer.

It appears that the defendants, corporate and individual, are presently unable to finance operations necessary to temporarily halt the further pollution of Lake Ontario as a result of the present conditions as the P A S site.

Accordingly, I will direct the Plaintiffs, the United States, the Plaintiff, to perform such operations as are immediately necessary to accomplish that purpose. In addition to the injunctive relief that I propose granting, a money judgement shall be forthwith entered against the defendants jointly and severally in such an amount as to certify to the clerk by the Plaintiff as the cost of complying with this order.

In order that the judgement may be a lien against the properties of the defendants, the clerk is directed forthwith, as part of this decree, to enter a judgement in favor of the United States against the defendants jointly and severally, the dollar amount of the judgement to be left blank, upon certification by the Plaintiff as hereby provided, the clerk shall fill in the amount of said judgement.

Upon the trial of the final injunction, the defendants may raise the issue of reasonableness of the cost of compliance, and if the sum for which the judgement has been entered is found to be unreasonable, the judgement may

be amended to the amount found to be reasonable by the Court.

Now, I have not spelled out the specific steps to be taken to alleviate the situation temporarily. I want to take that matter up with Counsel and perhaps with the litigants through Counsel, so that the minimum effective means can be utilized to contain this situation, pending the trial.

Now, for the information of the parties, I see no reason why this trial can't be held within certainly four weeks. The defendants are here. Apparently, the Corporate Defendant has been served and well may be in default—I don't know. I don't know the date of service.

These defendants can be served immediately. Issue can be joined and immediately thereafter, I am ready to hear the case. As a matter of fact, I doubt very much that there will be any evidence in addition to that which I already have. It seems to me that a permanent injunction can be tried in accordance with the Federal Rules of Civil Procedure on the basis of the evidence before me now.

So that, before I determine the specifics beyond the restraint already issued and the money judgement, I am going to ask Counsel to confer with me in Chambers and we may be able to dispose of the entire matter. I am not certain.

Stand in recess to Chambers.

Recess taken from 2:50 P. M. to 3:30 P. M.

The Court: As I indicated earlier, I requested the parties to submit suggested plans for incorporation in the decree with the view of providing a preliminary relief. Each of the parties has done so.

The proposal of the United States is being filed with the clerk of the Court and marked Court Exhibit 1. The proposal of the defendant Miller should be filed with the clerk of the Court, marked Court's Exhibit 2. And the same disposition of the statement of defendant Pierce, which is to be marked Court's Exhibit 3.

The parties just conferred with the Court in an effort to reach some agreement as to the form and content of the proposed order to be entered here providing for the preliminary injunctive relief.

Previously, I have outlined the general nature of the relief to be afforded. At the Chamber conference, an agreement could not be reached as to the terms of the order.

Accordingly, it is incumbent upon me to draft an order based on the trial and the use of the proposals suggested by the parties.

An examination of the proposals indicates that the proposal marked Number 6 in the Plaintiff's proposals has been offered in substance by all the parties. That provides for removal of the liquid contents from within the Coast Guard containment areas and processing the material on the site through a charcoal filtration system or other similar treatment facility, and discharging the effluent into Wine Creek under the supervision of the—and with the approval of the officials of the Environmental Protection Agency. So that that provision will be incorporated in the decree.

The first provision submitted by the Plaintiff I think goes beyond the necessity, the immediate necessities of the case. I am going to require, instead of the first proposal, that the removal of as much of the liquid materials contained within the million-gallon lined lagoon and the twenty-thousand-gallon lined pit as is necessary in the judgement of the E. P. A. officials to eliminate overflow or leakage likely to contaminate Lake Ontario.

The materials are to be disposed of consistent with applicable federal, state and local law.

In the event the measures just directed are insufficient to prevent further pollution of Lake Ontario pending the trial of the final injunction in this case, the Plaintiffs, upon one day notice to the defendants' attorneys, that is to Mr. Amdursky and Mr. Pierce, appearing *pro se,* the

Corporate Defendant not having appeared, may apply to the Court for such further specific measures as are necessary to prevent pollution of Lake Ontario, pending the trial.

I will prepare an order this afternoon based on my decision dictated on the record. The clerk is directed to forward certified copies to the attorney for the government, the attorney for Mr. Miller and to Mr. H. Willard Pierce, and although there has been no appearance on behalf of the Corporate Defendant and although both officials, or at least two officials of the Corporation are present in the Court and are served notice, I will direct the clerk to forward a copy of the decree to Mr. Hoag in view of the letter which has been filed with the Court in which he indicated a readiness to appear for the Corporation if need be.

Stand in recess.

3:40 P. M.

(2)

No. 85-484

Supreme Court, U.S.
FILED
NOV 21 1985
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

JACK MILLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

CHARLES FRIED
Solicitor General

F. HENRY HABICHT II
Assistant Attorney General

ROBERT L. KLARQUIST
SARAH P. ROBINSON
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

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14 pp

QUESTION PRESENTED

Whether an individual defendant, as distinct from a corporate defendant, may be held civilly liable for violating Section 13 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. 407.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 763 F.2d 133. The opinion of the district court (Pet. App. 7a-16a), issued orally, is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 3, 1985. On September 9, 1985, Justice Marshall extended the time within which to file a petition for a writ of certiorari to and including September 23, 1985. The petition was filed on September 20, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On July 19, 1977, the United States filed an action in the United States District Court for the Northern District of New York against Pollution Abatement Services of Oswego, Inc. (PAS), alleging continuing violations of Section 13 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. 407, which prohibits the dumping of refuse material into navigable waters, or the depositing of refuse material on the banks of navigable waters where it is liable to be washed into them. The United States subsequently filed an amended complaint, adding as defendants H. Willard Pierce and Jack Miller, President and Vice-President, respectively, of PAS. PAS, a New York corporation, operated a liquid and solid waste disposal service for industrial users at a site contiguous to Wine Creek, a tributary of Lake Ontario. The United States, in its complaint, charged PAS, Pierce, and Miller with dumping refuse matter (oil, chemicals, and other pollutants) into Wine Creek. The complaint further charged that the defendants had been storing thousands of drums of highly toxic chemicals —including polychlorinated biphenols (PCBs), pesticides, and hydrocarbons—on the banks of Wine Creek (Pet. App. 2a-3a). The United States requested the district court to enjoin the defendants from further dumping and depositing refuse material and to enter a decree requiring the defendants to remove certain refuse material from PAS property and from the banks of Wine Creek.

2. The district court held that PAS, Pierce, and Miller violated Section 13 of the Rivers and Harbors Act (Pet. App. 7a-16a). The court found that refuse materials from the PAS facility were discharged into Wine Creek and were deposited on the banks of Wine

Creek where they were likely to be washed into the river. The court further found that Wine Creek and Lake Ontario were navigable waters. In discussing the liability of the two individual defendants, Pierce and Miller, the court (*id.* at 9a-12a) stated:

> During all the pertinent times involved in this case, the defendants, H. Willard Pierce and Jack Miller, were stock holders, directors and officers of [PAS].
>
> * * * * *
>
> The individual defendants, by reason of their respective positions and activities in [PAS], and by reason of their activities, had the responsibility and the authority either to prevent, in the first instance, or promptly to correct the violations complained of, and they failed to do so.
>
> * * * * *
>
> The personal responsibility of the individual defendants arises out of the facts that demonstrate that they were in a position to control the activities of [PAS] in such a manner as to have in the first instance, not caused the pollutants to flow into the navigable water, and in the second instance, to have remedied the situation.
>
> The testimony shows that [PAS] is a small, closed corporation having, I believe four stock holders whose interests were divided into three thirty per cent interests with ten per cent interest going to the attorney * * *. By the very nature of the Corporation and its size, without the definite proof that we had, I think you would infer that there would be overlapping responsibilities of the officers and managers who were running the Company. It obviously was not so departmentalized as to either of the defendants, so that one of them would claim to be insulated from the prohibited conduct. [Citation omitted.]
>
> * * * * *

> The liability on the part of the defendants seems to be quite uncontrovertible.

In discussing the relief to be granted, the court noted the defendants' lack of technical and financial resources and the ensuing likelihood that the defendants would be unable to comply with a clean-up order. Thus, while stating that Pierce and Miller were "the responsible individuals" (Pet. App. 13a), the district court ordered the United States "to perform such operations as are immediately necessary" (*ibid.*) to halt the pollution of Lake Ontario due to the PAS facility. The court also ordered that a judgment be entered against the defendants, jointly and severally, for the cost of the clean-up operation, the dollar amount to be left blank until the costs of clean-up had been certified. The court further stated that the parties could address the issue of the reasonableness of the dollar amount of the cost of the clean-up at the trial of the permanent injunction. In March 1983, following the United States' clean-up operation, the district court entered the amount of $411,269.10 as the final judgment.[1] Prior to the certification of costs, PAS was dissolved by proclamation for nonpayment of taxes (see Pet. App. 4a n.2), leaving Pierce and Miller as the sole defendants. Pierce and Miller appealed the judgment.

3. The court of appeals affirmed. It characterized the sole issue on appeal as whether personal liability may be imposed upon the individual defendants (Pet. App. 4a), and added that the defendants had "mistakenly frame[d] the issue as whether corporate officers may be held civily liable for a *corporate* viola-

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[1] Pierce and Miller stipulated to the reasonableness of this figure as the amount expended by the United States to comply with the district court's order, obviating the need for a trial.

tion of the Act" (*id.* at 5a; emphasis added). The court of appeals held that individual corporate officers may be held personally liable for their own personal violations of the Rivers and Harbors Act. The court pointed out (Pet. App. 5a) that Section 16 of the Act, 33 U.S.C. 411 (emphasis added), expressly provides that "[*e*]*very person and* every corporation that shall violate" the statute shall be held criminally liable for such violation. The court then rejected the argument that civil penalties could not be levied under the Act, relying on this Court's decision to the contrary in *Wyandotte Transportation Co.* v. *United States*, 389 U.S. 191 (1967), involving a corporate defendant. The court of appeals reasoned that since Section 16, by its own terms, contemplated violations by both persons and corporations, and since civil remedies had long been imposed under the Act, it followed that a civil remedy could be imposed against individuals who violated the Act.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or another court of appeals. Accordingly, review by this Court is not warranted.

1. Section 13 of the Rivers and Harbors Act, 33 U.S.C. 407, prohibits the discharge of any refuse into any navigable waters of the United States or any tributary of navigable waters. Section 13 also prohibits depositing any material on the banks of a navigable water or tributaries where it is likely that such material will be washed into navigable waters.

The only express statutory remedy for violations of Section 13 is contained in 33 U.S.C. 411 (part of Section 16 of the Rivers and Harbors Act), which

provides for the assessment of criminal penalties against "[e]very person and every corporation that shall violate, or that shall knowingly aid, abet, authorize, or instigate a violation of the provisions of section[] 407." This Court has, however, long held that the United States may obtain appropriate relief in a civil suit against a party who violates the Rivers and Harbors Act. In *United States* v. *Republic Steel Corp.*, 362 U.S. 482, 491-493 (1960), this Court held that courts may order injunctive relief to remedy violations of the Act even where it contains no express provisions for such injunctive relief. To hold otherwise, the Court stated, would "impute to Congress a futility inconsistent with the great design of this legislation." *Id.* at 492. Similarly, in *Wyandotte Transportation Co.* v. *United States*, 389 U.S. at 201-205, the Court held that the United States could recover the costs of removing a vessel which had been carelessly sunk in navigable waters in violation of the Act. The Court there affirmed the Fifth Circuit's holding that "the United States may assert *in personam* rights—to injunctive or declaratory relief or damages—against those responsible." *Id.* at 193. In so ruling, the Court applied the principle that civil actions may be brought under penal statutes where "criminal liability [is] inadequate to ensure the full effectiveness of the statute which Congress had intended." *Id.* at 202. The Court in *Wyandotte* thus determined that Congress did not intend the "statutory remedies and procedures [expressly mentioned in the Rivers and Harbors Act] to be exclusive of all others." *Id.* at 200.

2. Here, as the court of appeals pointed out, petitioner does not deny that injunctive relief was ap-

propriate, and the sole issue is "whether personal liability may be imposed upon the individual defendants" (Pet. App. 4a). The court of appeals upheld the district court's determination that the two individual defendants, including the petitioner, personally violated the Section 13 prohibition against dumping refuse in navigable waters. The court of appeals stated that the liability of the petitioner "was bottomed on [his] personal involvement in the firm's activities" (Pet. App. 5a), and correctly ruled that "corporate officers who are personally involved in or directly responsible for statutorily proscribed activity" (Pet. App. 6a) may be held civilly liable. This conclusion necessarily follows from this Court's holdings, discussed above, that a party who violates the Rivers and Harbors Act may be held civilly liable for injunctive relief or for the costs of clean-up, and from the fact that 33 U.S.C. 411, by its own terms, contemplates violations both by corporations and by individual persons.

3. Contrary to petitioner's contention, the decision of the court of appeals does not conflict with the Fifth Circuit's decisions in *United States* v. *Sexton Cove Estates, Inc.*, 526 F.2d 1293, 1300-1301 (1976), or *United States* v. *Joseph G. Moretti, Inc.*, 526 F.2d 1306, 1310-1311 (1976). In *Sexton Cove*, the Fifth Circuit held:

> A corporate officer may not be held civilly liable for a *corporate* violation of the Rivers and Harbors Act unless either the Act itself authorizes such liability, or there are sufficient allegations and proof to permit negation of the corporate form. The enforcement section of the statute

> [33 U.S.C. 406] does not provide that an officer of a corporation which violates Section 403 is personally liable on *any* subsequent civil judgment obtained against the corporation.[2]

526 F.2d at 1300-1301 (emphasis added; footnote omitted). Thus, as the court of appeals below correctly observed (Pet. App. 5a), the question decided by the Fifth Circuit was whether a corporate officer could be held liable for corporate violations of the Rivers and Harbors Act, regardless of his degree of personal involvement—*i.e.*, on a theory of derivative liability.[3] By contrast, the question in the present case is whether a corporate officer may be held civilly liable for *his own* personal violation of the Rivers and Harbors Act—*i.e.*, on a theory of direct, personal liability —where his personal accountability for the violations is " 'quite uncontrovertible' " (court of appeals opinion at Pet. App. 3a, quoting district court holding at

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[2] Thus, *Sexton* and *Moretti* involved 33 U.S.C. 403 and its enforcement section, 33 U.S.C. 406, rather than Sections 407 and 411. While not necessary to distinguish these cases from the instant one, we note that 33 U.S.C. 411—unlike 33 U.S.C. 406—covers not only those who violate the underlying statutory prohibitions, but also those "that shall knowingly aid, abet, authorize, or instigate a violation."

[3] That this is all the Fifth Circuit was addressing is further demonstrated by footnotes 19 and 20 (526 F.2d at 1300-1301) in *Sexton*, which also deal with such ipso facto liability, and by the fact that the court's opinion does not discuss the otherwise rather obvious question of why personal liability should be barred when the enforcement section at issue, 33 U.S.C. 406, applies to "persons" as well as "corporations." Moreover, it would have been odd, to say the least, for any court to hold that an individual is immunized from personal liability because he is an officer of a corporation which is being held liable. Nothing in the Fifth Circuit's decisions suggests that it contemplated such a holding.

Pet. App. 12a). There is, accordingly, no conflict between the holding below and *Sexton Cove* or *Moretti*.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

F. HENRY HABICHT II
Assistant Attorney General

ROBERT L. KLARQUIST
SARAH P. ROBINSON
Attorneys

NOVEMBER 1985

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[4] *Moretti* was a companion case to *Sexton Cove*. The two cases were decided on the same day, and *Moretti* cites only *Sexton Cove* as authority and does not add to it. 526 F.2d at 1310-1311. Petitioner's argument (Pet. 6-8) that on the facts of those cases the Fifth Circuit could have dealt with the issue of direct, rather than derivative, liability does not gainsay the fact that it did not do so.

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